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In The

Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, et al.,

Petitioners,

v.

EVELYN ELLIOTT AND BENITO MOLINA, et al.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, et al.,

Petitioners,

v.

FANNIE BUFFINGTON AND FRANCES BINER, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

J. ALBERT WOLL
ROBERT C. MAYER
815 15th Street, N.W.
Washington, D.C. 20005

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006

MARSHA S. BERZON
117 Post Street, Suite 700
San Francisco, California 94108

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INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* is filed in support of the posi-

tion of the respondents by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 106 national and international labor unions, having a total membership of approximately 13,500,000 working men and women, with the consent of the parties, as provided for by Rule 42 of the Rules of this Court.

For many retired or disabled members of AFL-CIO unions, and for many survivors and dependents of members, social security benefits, derived from contributions during years of employment, are the major source of funds for meeting daily living expenses. Any suspension of such benefits pursuant to the procedures at issue in this case is likely to cause such individuals to forego the most basic necessities for the period of the suspension. Later reimbursement of erroneously withheld benefits will not supply these necessities at the time they were needed. Thus, the AFL-CIO is interested in assuring its members that the promise represented by the social security system is not an illusory one. In furtherance of this interest, the AFL-CIO participated as *amicus curiae* in *Mathews* v. *Eldridge*, 424 U.S. 319.[1]

ARGUMENT

1. *Introduction.* At this juncture, the only issue in this case is whether the procedures used by the Secretary of Health, Education and Welfare in applying § 204(b) of the

[1] The AFL-CIO has also appeared as *amicus curiae* in other cases relating to the procedures involved in social benefit programs, including *California Human Resources Dept.* v. *Java*, 402 U.S. 121 and *Fusari* v. *Steinberg*, 419 U.S. 379.

Social Security Act, 42 U.S.C. § 404(b), are valid.[2] That section, which comes into play only when there has been an overpayment of benefits, provides:

> In any case in which more than the correct amount of payments has been made, *there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.* [Emphasis added.]

Thus far, this case, and *Mattern* v. *Mathews*, 582 F.2d 248 (C.A. 3) pending on petition for *certiorari, sub nom., Califano* v. *Mattern*, No. 78-699 have both proceeded upon the assumption that the statutory scheme permits the system used by the Secretary in applying § 204(b). It is our view, however, that careful examination of the statutory scheme suggests that the present procedures may well violate the statute itself. If so, there would be no need to address the constitutional question principally raised by respondents and addressed by the Court of Appeals.

2. *Reasons for A Statutory Approach.* This Court, as one of the rules it has developed "for its own governance

[2] Two other questions decided below are no longer at issue. First, the Secretary apparently does not dispute the portion of the judgment requiring considerably clearer notice of the rights of beneficiaries in overpayment cases than has heretofore been provided. (See Pet. App. 34A-35A; 115A; compare Sec. Br. 2 (Questions Presented).) Second, while the Ninth Circuit opinion would have required oral hearings on the overpayment issue itself in certain limited instances, respondents, we understand, are not defending this portion of the judgment.

in the cases confessedly within its jurisdiction under which it [avoids] passing upon a large part of all the constitutional questions pressed upon it" (*Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 346 (Brandeis, J., concurring)), recognizes as its "first obligation" to determine whether governmental action taken pursuant to a federal statute is indeed sanctioned by that statute. (*United States* v. *C.I.O.*, 335 U.S. 106, 110.) If "a construction of the statute is fairly possible by which the [constitutional] question may be avoided" (*Crowell* v. *Benson*, 285 U.S. 22 62), then the Court will adopt that construction, if necessary, "[o]n its own motion." (*C.I.O., supra*, 335 U.S. at 129 (Frankfuter, J. concurring); see also, e.g., *Machinists* v. *Street*, 367 U.S. 740, 749; *Pipefitters* v. *United States*, 407 U.S. 385, 400-401; *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134.)

This principle applies with particular force where serious constitutional issues relating to alleged deprivation of procedural due process rights have been raised:

> Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process. See, e.g., *The Japanese Immigrant Case*, 189 U.S. 86, 101; *Dismuke* v. *United States*, 297 U.S. 167, 172; *Ex parte Endo*, 323 U.S. 283, 299-300; *American Power Co.* v. *Securities and Exchange Comm'n*, 329 U.S. 90, 107-108; *Hannegan* v. *Esquire*, 3217 U.S. 146, 156; *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49. Cf. *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337; *United States* v. *Rumely*, 345 U.S. 41. These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition. [*Greene* v. *McElroy*, 360 U.S. 474, 507-508.][3]

Whatever the ultimate view of this Court would be on the merits of the constitutional issues here involved, the opinion below, and that in *Mattern, supra*, demonstrate that those issues are "serious." Indeed, both opinions address the constitutional detail and with learning and sensitivity. We cannot therefore add to the demonstration there made. But we can and do show now that a reading of the relevant statutory provisions to require an opportunity for an oral hearing on the applicability of § 204(b) *prior* to recoupment is "not only fairly possible but entirely reasonable." (*Street, supra*, at 750.)

3. *The Present Procedures.* In summary, the system for determining whether recoupment will be waived presently works as follows:[4] The Secretary announces in writing to a beneficiary that there has been an overpayment, and that recoupment of the overpayment will begin approximately

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[3] Thus, in *Java, supra*, 402 U.S. at 124 the Court first considered whether or not the state's procedures for determining eligibility for unemployment compensation were consistent with federal law; having held that they were not the Court had no occasion to reach plaintiff's due process contention.

[4] While this case has been pending, there have been changes in procedures, the last of which are included in the revised 1979 Claims Manual, and portions of which are appended to the Secretary's Brief. It is unclear the extent to which certain of the present procedures are the direct result of the lower court judgments in this case and in *Mattern*, and ought therefore not be considered for present purposes. For example, the Claims Manual sections which appear at Pet. App. 119A *et seq.* are not dated. Since they refer to "[p]rocedural due process" requirements, they may well represent, in their stress upon personal contact with the claimant as part of the pre-recoupment waiver requirement (Pet. App. 128A et seq.) an attempt to meet the judgments below. If so, one cannot assume that the same instructions would remain in effect if those judgments were reversed.

30 days later. Although the claimant is informed generally of the provisions of § 204(b), no attempt whatever is initially made to ascertain whether government has overcome the bar to repayment declared in that provision. Rather, the burden is placed upon the beneficiary, upon reading a summary of § 204(b), to come forward and claim protection under the section.

Further, under the 1979 Claims Manual provisions appended to the Secretary's Brief, the claimant is affirmatively discouraged from seeking a determination under § 204(b). For, if no such determination is sought, recoupment will ordinarily proceed at a rate of 25% of each benefit check due, unless the claimant proposes withholding of a lesser amount; in that case, the lesser amount will be permitted if it will result in complete recovery, at a rate of at least $10 per check, within 48 months or before benefits terminate, whichever is the shorter period. (Sec. Br., 31; 2a-7a). If, however, the claimant invokes the applicability of § 204(b) but the Secretary disagrees, amounts greater than 25%, and greater than any amount requested, may be withheld. (*Id.*, at 32 n.24, 8a-12a.)

The claimant who despite this discouragement, does come forward to claim the protection of § 204(b) is not assured, prior to losing present benefits for which his eligibility is not in question, a decision-making process reasonably likely to decide accurately the pertinent issues under § 204(b). As the Court of Appeals noted (Pet. App. 26A-30A), the waiver determination involves, under the Secretary's regulations interpreting § 204(b), many questions which cannot reliably be decided upon written submissions alone. For example, the decision whether an individual was "without fault" as regards an overpayment includes an assessment of the per-

son's "intelligence * * * and physical and mental condition" as well as an assessment of what "he knew or should have known * * * or could have been expected to know." (20 CFR § 404.507.) Deciding whether recovery would be "against equity and good conscience" similarly involves an individualized assessment of a claimant's circumstances, and of whether he or she has acted reasonably in those circumstances. (20 CFR § 404.508.) While deciding such questions purely upon written submissions may be bureaucratically efficient, such a procedure wantonly sacrifices the accuracy and sensitivity of decisions depending in large part upon an assessment of an individual's *bona fides*.[5]

4. *The Statute and Its Meaning.* Assessing the validity of these procedures under the statutory scheme involves reading in conjunction three provisions—§ 204(b), § 205(b) and § 225.

A. Section 204 (b), the substantive provision, is written in mandatory terms: "[T]here shall be no adjustment * * * if * * *." Thus, the statute does not merely *permit* the Secretary to forego recovery of overpayments if so requested; it *forbids* recovery, as a matter of public policy, in the situations described in the section.

Pertinent in this regard is the fact that one of the sub-

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[5] It must be remembered, in this regard, that providing an *opportunity* for an oral hearing is not equivalent to providing a hearing in each case. Especially where, as here, there is nothing particularly to be gained by delay alone, the beneficiary will have his or her own reasons to forego an oral hearing unless he believes it will be of material aid in resolving the issues; appearance at an oral hearing is likely both to inconvenience and to intimidate the average person and, particularly, the average aged or disabled person.

stantive standards of § 204(b) is whether "such adjustment or recovery would defeat the purpose of this subchapter." The chief "purpose of this subchapter" is to

> assure that when earnings from work are cut off because of the retirement, disability, or death of the family breadwinner, each covered worker and his family will have a continuing source of income related to his previous earnings and to assure that they can get this protection with dignity. [Report of the Advisory Council on Social Security, H.R. Doc. No. 9290, 92d Cong., 1st Sess. pp. 48-49.]

Thus, the procedures used to implement § 204(b) must be reasonably adapted to assuring "a continuing source of income" to individuals overpaid in the past through no fault of their own.

Viewed in this light, the present procedures are deficient. For, the Secretary rather than simply announcing that there has been an overpayment and soliciting from the recipient the facts pertinent to the standards of § 204(b) before deciding whether there is to be recovery, announces at least a partial interruption of the benefits and awaits a protest from the claimant before seeking any information whatever pertinent to § 204(b). Moreover, by penalizing those who do come forward with the possibility of a larger deprivation of benefits than if they had failed to assert statutory rights, the present procedures affirmatively discourage the development of facts reasonably adapted to accurate implementation of § 204(b).

While the above analysis illustrates, in our view, that the present procedures plainly contravene § 204(b), that analysis alone does not necessarily lead to the conclusion that the statute requires an opportunity for a prior *oral*

hearing. Read in conjunction with other portions of the Act, however, we believe that at the least that conclusion, which would pretermit the need for a constitutional decision is "fairly possible." (*Street, supra.*)[6]

B. Section 205(b) is the provision basically establishing the right to an oral due process hearing to review decisions by the Secretary. It reads, as here pertinent, as follows:

> (b) The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, husband, widower, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision * * *.

Reading this provision in conjunction with § 204(b) confirms the conclusion that, at the very least, the Secretary's present procedures do not comport with the statute insofar as they fail to provide for any development, written *or* oral, of any facts pertinent to § 204(b) before, in effect, announcing a determination that the section's standards

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[6] The Court, of course, may disagree with the remainder of our statutory analysis, and disagree as well with the constitutional determination of the Court of Appeals. If so, the fact that the Secretary's present procedures do plainly contravene the statute by failing to implement § 204(b) at all except upon specific request, and by discouraging such requests, ought to result in a remand for determination of an appropriate remedy for *that* statutory violation.

have not been met. For, § 205(b) mandates that any "decisions as to the rights of any individual * * * under this subchapter" be accompanied by "findings of fact." "Findings of fact" require, first, facts. Yet, at present *no* attempt is made at the initial stage to elicit the relevant facts.

Further, as noted above, whatever may be true with regard to other situations in which § 205(b) applies, many issues which arise under § 204(b) are resolvable in a reasonably accurate manner only if the ultimate finder of fact is able directly to observe the character and demeanor of the claimant. Thus, the language and purpose of § 204(b) are best implemented if § 205(b) is read to require an opportunity for a *prior* oral hearing where the claimant believes such a hearing would be useful in demonstrating a lack of "fault," an inconsistency with the purposes of the Act, or a violation of "equity and good conscience." (§ 204(b).)

Certainly, the principles of *Greene, supra,* call for reading § 205(b) as requiring an opportunity for *prior* oral hearings when § 204(b) is at issue. For, § 205(b) lacks the "most explicit action by the Nation's law-makers" (360 U.S. at 508) necessary if, despite the weighty constitutional considerations surveyed by the Court of Appeals, the Act is to be read to permit hearings too late to assure that, "there [is] * * * no * * * adjustment of payments" when the substantive standards of § 204(b) are met.

C. There is, in another part of the Act, a direct indication that § 205(b) not only may but *should* be read to require an opportunity for prior oral hearings on § 204(b) issues. Section 225 deals with a different situation than that involved in this case—one in which the Secretary "believes that an individual * * * may have ceased to be under a

disability." In that situation, § 225 explicitly permits "the Secretary [to] * * * suspend the payment of benefits under * * * section 402(d), 402(e), 402(f) or 423 of this title until it is determined (as provided in section [221] of this [Act]) whether or not such individual's disability has ceased * * *." Section 221, in turn, provides that "[a]ny individual dissatisfied with any determination [of] whether or not he is under a disability shall be entitled to a hearing * * * [under] section [205(b)] * * *."[7]

If § 205(b) itself ordinarily permitted the hearing provided to be held after suspension of any benefits already being received, then § 225 would be entirely superfluous—suspension of benefits prior to a hearing would be allowed under § 205(b) itself, as incorporated in § 221. Thus, § 225 is most sensibly read as an *exception* to the usual timing of a § 205(b) hearing, and § 205(b), in turn, is best interpreted as requiring a hearing *prior* to any suspension of benefits unless the statute elsewhere expressly provides otherwise. Since there is no provision parallel to § 225 when suspension of benefits because of earlier overpayments is in question, the statute as a whole is most reasonably construed to require that the entire decision-making process, including an opportunity for oral hearing under § 205(b) on whether recovery is precluded by § 204(b), be completed *before* benefits are withheld.

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[7] *Mathews* v. *Eldridge,* 424 U.S. 319, involved a suspension of benefits received under § 223 (*id.,* at 323), so that the suspension in that case was explictly permitted by § 225. This explains why avoidance of constitutional determination through statutory interpretation was not "fairly possible" in *Eldridge,* and shows that the statutory approach to this case we suggest is not inconsistent with *Eldridge* in any way.

There are two ready explanations for drawing a distinction between disability determinations and waiver decisions in setting the timing of a § 205(b) hearing. The first is the significant difference between the two situations as regards the necessity for oral confrontation; that difference was the principal reason why the Court of Appeals felt the constitutional balance struck in *Eldridge, supra,* was not controlling here. Secondly, if the Secretary's "belief" that a disability has ceased is later confirmed, then any benefits paid while the decision-making process continued would not be due at all, and might well be lost to the social security system forever. In contrast, in § 204(b) cases, continuing benefits while completing as careful as possible a waiver determination ordinarily will simply delay recoupment rather than rendering it impossible. This explains why Congress appears to have viewed the balance of public versus private interest as tipped in one direction in the case of disability terminations and in the other in the waiver situation.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

J. ALBERT WOLL
ROBERT C. MAYER
815 15th Street, N.W.
Washington, D.C. 20005
LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
MARSHA S. BERZON
117 Post Street, Suite 700
San Francisco, California 94108